2013 IL App (1st) 113425-U

SIXTH DIVISION
September 13, 2013

No. 1-11-3425

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 C2 20607
	)	
GERALD HACKER,	)	Honorable
	)	Garritt E. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The trial court did not abuse its discretion when, after considering evidence in mitigation and aggravation, it sentenced defendant to a Class X sentence of 10 years in prison. Defendant was subject to the three-year term of Mandatory Supervised Release. The DNA analysis fee was vacated, and the mittimus was corrected to reflect defendant's proper name.

¶ 2 On July 22, 2011, following a bench trial, defendant Gerald Hacker[1] was found guilty of burglary and sentenced to a Class X sentence of 10 years in prison because of his criminal background. On appeal, defendant argues the trial court, in sentencing him, failed to consider his potential for rehabilitation and certain mitigating factors. Defendant further argues the trial court improperly imposed the three-year term of Mandatory Supervised Release (MSR) which accompanies a Class X felony, when he was only subject to a two-year term of MSR based upon his

[1]The case was charged under the name "Jonathan Hacker," though it came to light at trial that defendant's name is "Gerald Hacker." Jonathan is defendant's twin brother.

conviction for the Class 2 felony of burglary. Defendant also contests the imposition of the $200 DNA analysis fee was erroneously imposed. Finally, defendant requests the mittimus be corrected to reflect his proper name rather than the name of his twin brother which defendant falsely provided to police when he was arrested. We affirm, but vacate the DNA analysis fee, and order that the mittimus be corrected.

¶ 3 At trial, the State presented three witnesses: brother and sister–David Cupello and Christina Cupello, and Officer Ruth Hahn. Mr. Cupello testified that he and his sister live on the 1400 block of North Tyrell in Park Ridge where he observed defendant enter his sister's Honda Accord in the early morning hours of September 27, 2010. From the window of his home, Mr. Cupello first noticed defendant that morning, running toward the driveway. In order to investigate, Mr. Cupello exited the house through a side door next to the garage–about five feet away from defendant–and hid. The driveway was illuminated by the lights on the garage and the house. There were three vehicles parked on the driveway in a horizontal line. Ms. Cupello's Accord was the closest to Mr. Cupello. He observed defendant enter the Accord and rummage through the center console for approximately 45 to 50 seconds. Mr. Cupello went inside the house to get his sister. When Ms. Cupello came out, she discovered that an iPod, two iPod cases and a charger, as well as some cigarettes were missing from the center console. Ms. Cupello had not locked the door to the Accord. Shortly after 2 a.m., Officer Hahn arrived on the scene. Mr. Cupello gave the officer a description of the person he observed enter the Accord: a white male with a thin build and short slicked-back hair wearing a black t-shirt and blue jeans. Ms. Cupello described to Officer Hahn the items that were missing from her Accord.

¶ 4 Officer Hahn left the Cupello residence and sent out a flash message that she was searching for a white male with short hair and a thin build wearing a black t-shirt and blue jeans. Officer Hahn searched the area and observed defendant on his bicycle approximately 100 feet east of the Cupello residence. At that time, defendant was wearing an off-white or gray t-shirt and Officer Hahn

described him as having hair longer than one inch. Officer Hahn activated her lights and stopped defendant. Officer Hahn conducted a protective pat down on defendant and found an iPod Touch and two iPod cases in defendant's right pocket. Defendant indicated these items belonged to him. Officer Hahn placed him in handcuffs and continued her search. A cellular phone, a cellular phone charger, and chewing tobacco were then recovered from defendant's person. Defendant gave his name as Jonathan Hacker. Officer Hahn transported defendant back to the Cupello residence where Mr. Cupello identified him in a show-up. Ms. Cupello identified the items retrieved from defendant's pockets as the items missing from her vehicle. Ms. Cupello did not know defendant and had not given him permission to enter her vehicle.

¶ 5 The defense presented the testimony of Katie Hacker, defendant's mother, and Markus Horenberger, defendant's brother. Both testified that defendant was with them on the evening of September 26, 2010, at Ms. Hacker's house until defendant left around 11 p.m. Defendant borrowed Ms. Hacker's bicycle but did not say where he was going. Later, about 2:30 a.m. on September 27, 2010, defendant called Mr. Horenberger and asked him to bring him the cell phone he had left at Ms. Hacker's house. Ms. Hacker and Mr. Horenberger met defendant at a Wendy's restaurant near Dempster and Potter Streets. Defendant approached their vehicle on the bicycle, but then stopped to pick something up from a grassy area in the parking lot. When defendant reached the vehicle, he showed Ms. Hacker and Mr. Horenberger the items which he had discovered in the grass, including an iPod Touch. After 10 to 15 minutes, defendant rode off on the bicycle.

¶ 6 The trial court found defendant guilty of burglary after concluding defendant's witnesses were unbelievable, and Mr. Cupello was a "highly credible witness."

¶ 7 At sentencing, both sides agreed that defendant was subject to sentencing as a Class X offender based on his criminal background. The State sought a substantial term of imprisonment based upon defendant's criminal history. Defense counsel argued in mitigation that defendant's criminal record was due to a substance abuse problem, and that a minimal sentence would allow him

to reevaluate his life and get the assistance he needed for his drug problem.

¶ 8 In sentencing defendant, the trial court stressed that it had considered the relevant factors in aggravation and mitigation, the presentencing report, and the arguments of the parties. The presentencing report included details about defendant's personal background, family history, drug use, and criminal record. At the hearing, the trial court stated:

> "Early on in any defendant's criminal history, we weigh rehabilitative potential versus protecting society from further criminal conduct by the particular defendant. And early in a person's criminal history, it is strongly weighted toward rehabilitation because we as judges, and I in particular, don't like to send young people to the penitentiary because they certainly never improve themselves in the penitentiary. *** But Mr. Hacker, you're at a stage now where the balance of the scale is going the other way. I don't have a whole lot of confidence that you're not going to do the same thing when you are out."

The trial court considered that defendant had seven penitentiary sentences over a 10-year period for "basically the same thing over and over again." The trial court concluded that at this stage in defendant's "career," a lengthy penitentiary stage was necessary, "if for no other reason than to protect [future] victims." The trial court specifically recognized that the offense at issue was not heinous, and that no one was injured. The trial court sentenced defendant to a Class X sentence of 10 years in prison with three years MSR.

¶ 9 On appeal, defendant first argues the trial court abused its discretion by imposing an excessive sentence based upon its belief that defendant lacked rehabilitative potential. Defendant also argues the trial court failed to consider certain mitigating evidence, *i.e.*, he was a nonviolent offender with a serious substance abuse problem.

¶ 10 Defendant acknowledges he did not specifically raise a claim that the trial court failed to consider his potential for rehabilitation in his motion to reconsider sentence, but had argued his sentence was excessive in view of his background. See 730 ILCS 5/5-4.5-50(d) (West 2010) (which

provides in pertinent part that "[a] defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence."). Defendant argues that, if the claim is not preserved, this court should review the issue for plain error. The plain-error doctrine is a limited and narrow exception which allows review of forfeited issues. *People v. Hillier,* 237 Ill. 2d 539, 545 (2010). To obtain relief pursuant to the plain-error doctrine, a defendant must show first that a clear or obvious error occurred. *Id*. A defendant must also show: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious, as to deny him a fair sentencing hearing. *Id*.

¶ 11 In the case at bar, we need not determine whether defendant properly preserved this issue for review because, we find the trial court did not abuse its discretion when sentencing defendant.

¶ 12 A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence within the statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, habits, credibility, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010).

¶ 13 Here, defendant was convicted of burglary and sentenced because of his criminal background to a Class X sentence of 10 years in prison. The applicable sentencing range for a Class X offense is not less than 6 years and not more than 30 years. See 730 5/5-4.5-25 (West 2009).

¶ 14 The record reveals that at sentencing, the parties presented evidence in aggravation and mitigation including defendant's criminal history and substance abuse problem. In sentencing

defendant, the trial court noted that it had considered the relevant factors in aggravation and mitigation, the presentencing report, and the parties' presentations. The trial court then noted defendant, who had seven prior penitentiary sentences over a 10-year period, had a pattern of committing "basically the same [crimes] over and over." Ultimately, the trial court concluded that a prison term was necessary to protect society from defendant. However, noting that the crime at issue was not heinous and that no one was injured, the trial court sentenced defendant to 10 years in prison. This court cannot say that a Class X prison sentence of 10 years was an abuse of discretion when defendant was sentenced to only four years above the statutory minimum. See *Patterson*, 217 Ill. 2d at 448 (a trial court has broad discretion in sentencing).

¶ 15 Defendant argues the trial court improperly sentenced him without considering his potential for rehabilitation because it believed rehabilitation can only be considered early in a defendant's criminal history. We disagree.

¶ 16 While a defendant's potential for rehabilitation must be considered, the trial court is not required to give more weight to a defendant's chance of rehabilitation than to the nature of the crime (*People v. Evans*, 373 Ill. App. 3d 948, 968 (2007)), or to explain the value the court assigned to each factor in mitigation and aggravation. *Brazziel*, 406 Ill. App. 3d at 434. It is presumed that the trial court properly considered the mitigating factors and a defendant's potential for rehabilitation–it is the defendant's burden to show otherwise. *Id*. Although the trial court expressed its general philosophy–that a defendant's potential for rehabilitation may be weighed more heavily when a defendant is young and lacks a criminal record–it is clear from subsequent comments that the trial court then turned to and considered defendant's individual circumstances. In analyzing defendant's potential for rehabilitation, the trial court specifically stated defendant continued to commit the same crimes "over and over", and that the trial court was not confident defendant would not reoffend. Contrary to defendant's argument, the trial court considered defendant's potential for rehabilitation in light of his criminal record, which included seven penitentiary sentences within a decade. See 730

ILCS 5/5-5-3.2(a)(3) (West 2010) (a defendant's history of prior criminal activity is a factor that may be considered in aggravation at sentencing).

¶ 17 We reject defendant's argument that the trial court did not consider the nonviolent nature of his criminal activity, as the court noted at sentencing that the instant crime was not heinous and no one was injured. With regard to defendant's contention that the trial court did not consider his substance abuse problem as mitigation, evidence of a defendant's drug abuse is not necessarily mitigating (*People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009)) and, as we have stated, the trial court is not required to explain the value it assigned to each factor in mitigation and aggravation, including defendant's history of drug abuse. *Brazziel*, 406 Ill. App. 3d at 434. Ultimately, the trial court did not abuse its discretion when, after properly considering factors in mitigation and aggravation, it sentenced defendant to a Class X sentence of 10 years in prison. *Evangelista*, 393 Ill. App. 3d at 399.

¶ 18 Defendant next argues the trial court improperly imposed the three-year term of MSR that accompanies a Class X felony when he was convicted of a Class 2 felony.

¶ 19 Although defendant acknowledges he failed to object to the three-year term of MSR before the trial court, he argues this issue is not forfeited because the MSR term is void. See *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (a void sentence may be challenged at any time). We disagree.

¶ 20 Section 5-4.5-95(b) of the Unified Code of Corrections provides that a defendant over the age of 21 who is convicted of a Class 1 or Class 2 felony shall be sentenced as a Class X offender if he has prior convictions for two Class 2 or higher class felonies arising out of a different series of acts. 730 ILCS 5/5-4.5-95(b) (West 2010) (previously codified at 730 ILCS 5/5-5-3(c)(8) (West 2008)). The MSR term attached to a Class X sentence is three years. 730 ILCS 5/5-8-1(d)(1) (West 2010).

¶ 21 This court has previously held that when Class X treatment is accorded to a defendant, the MSR term applicable to such a sentence is automatically imposed (*People v. Anderson*, 272 Ill. App.

3d 537, 541 (1995)), *i.e.*, a Class X offender receives both an enhanced prison term and an enhanced MSR term. *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000); see also *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009).

¶ 22 Defendant argues that *Anderson, Smart,* and *Watkins* were wrongly decided in light of our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). However, this court in *People v. Brisco*, 2012 IL App (1st) 101612, and *People v. Rutledge*, 409 Ill. App. 3d 22 (2011), has considered and rejected similar arguments. Thus, we continue to adhere to the holding in *Anderson*. Accordingly, as defendant was sentenced as a Class X offender, he properly received both an enhanced term of imprisonment and an enhanced MSR term. See *Smart*, 311 Ill. App. 3d at 417-18. Defendant's sentence is not void, and his failure to raise his challenge as to the MSR term at sentencing and in a motion to reconsider, results in its forfeiture on appeal. See *People v. McKinney*, 399 Ill. App. 3d 77, 79 (2010).

¶ 23 As to the appeal of the $200 DNA analysis fee, the State agrees that under *People v. Marshall*, 242 Ill. 2d 285 (2011), the imposition of the DNA indexing fee in this case was improper because defendant provided a DNA sample in a prior case. *Id*. at 302. Thus, the $200 DNA analysis fee is vacated, and the fines and fees order should be corrected to show a total of $375.

¶ 24 Finally, defendant argues his mittimus should be corrected to reflect his proper name–Gerald Hacker–rather than that of his twin brother–Jonathan Hacker. Accordingly, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the circuit court clerk to correct the mittimus to reflect defendant's name–Gerald Hacker.

¶ 25 Pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we order the clerk of the circuit court to correct the fines and fees order to reflect the vacation of the $200 DNA analysis fee and a corrected total of $375, and to correct the mittimus to reflect defendant's proper name–Gerald Hacker. We affirm the circuit court of Cook County in all other aspects.

¶ 26 Affirmed; fines and fees order corrected, mittimus corrected.